

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition of Lincoln County, Oregon)
and the Economic Development)
Alliance of Lincoln County, a non-profit)
corporation for Declaratory Ruling and)
Preemption Pursuant to Section 253)
of the Communication Act of 1934 of)
Certain Provisions of the Oregon)
Telecommunications Utility Law)

CC Docket No. 97-241

**OPPOSITION OF GTE TO PETITION
FOR DECLARATORY RULING AND PREEMPTION**

GTE Service Corporation, on behalf of its affiliated domestic telephone operating, wireless and video companies, respectfully submits these comments in opposition to the Petition for Declaratory Ruling and Preemption ("Petition") filed by Lincoln County, Oregon (the "County") and the Economic Development Alliance of Lincoln County ("The Alliance") (collectively, "Petitioners"). A GTE wireline telecommunications provider, GTE Northwest Incorporated, provides telecommunications services in thirteen Oregon counties, including the types of services which Petitioners proposed to provide and for which they sought certificates of authority from the Oregon Public Utility Commission ("OPUC"). GTE protested Petitioners' applications and the OPUC rejected those applications in Order 97-373. The instant Petition seeks preemption of OPUC Order 97-373.

As set forth below, GTE believes that the Commission should decline from preempting the OPUC's determinations, as set forth in Order 97-373, as to what entities

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must and may, under Oregon state law, obtain certificates of authority before providing intrastate telecommunications services. Nothing in the 1996 Act even remotely suggests that Section 253 may be utilized for the purpose of undermining the power committed by a state to its regulatory utility commission to require certificates of authority prior to the provision of intrastate telecommunications services.

I. THE FACTS UNDERLYING THE PETITION.

A. The Nature of Petitioners' Preemption Request.

On November 17, 1997, the County and The Alliance filed their Petition pursuant to Section 253 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,¹ challenging OPUC Order 97-373.² In Order 97-373, the OPUC denied Petitioners' applications for Certificates of Authority to Provide Telecommunications Service in Oregon and Classification as Competitive Providers. The OPUC based its decision on two interrelated state law determinations: (1) That the services proposed by Petitioners constitute "telecommunications service" under Oregon law and therefore required the issuance of certificates of authority before such services could be provided (Order, at 6-8); and (2) That the applications of Petitioners involved the purchase or leasing of facilities from a third party (The Central Lincoln People's Utility District), a governmental entity that declined to submit an application or appear before the OPUC and which, under Oregon law, would also be required obtain a certificate of authority before it made its facilities available to Petitioners for resale to

¹ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 53 (February 8, 1996), *codified at* 47 U.S.C. § 151 *et seq.* the "1996 Act").

² A copy of OPUC Order 97-373 is attached to the Petition.

others (Order, at 8, 10). Petitioners' preemption claim seeks to have the Commission overturn the OPUC's interpretation of Oregon law and require the OPUC to issue certificates of authority to political subdivisions of the State of Oregon which, as creatures of the Oregon Legislature, are not authorized to obtain such certificates.

B. The Status of the Relevant Parties.

The County is a political subdivision of the State of Oregon. The Alliance is an Oregon not-for-profit corporation existing under the laws of the State of Oregon. The Central Lincoln People's Utility District ("CLPUD") is a governmental district existing under Oregon law. Both the County and the CLPUD are creations of statute and their powers and authority are confined to those established by the Oregon Legislature.

Powell Grove Cem. v. Multnomah Co., 228 Or. 597, 600, 365 P.2d 1058, 1060 (1961).

C. The Services Proposed By Petitioners in Their Applications.

As set forth in their applications to the OPUC, Petitioners sought authority to be resellers of telecommunications services utilizing a fiber optic network known as CoastNet. Order, at 2. CoastNet consists of transport facilities ("dark fiber") provided to the County by the CLPUD pursuant to an intergovernmental agreement combined with switches provided by The Alliance. Order, at 3. It was apparently envisioned that The Alliance would be the primary reseller of transport on the CoastNet facilities, both to end users and to secondary resellers "who will be required to have a Certificate of Authority from the PUC". Order, at 4, *quoting* June 6, 1997 letter from the County to GTE.

D. The Challenged Order.

In Order 97-373, the OPUC found that, under Oregon law, the services proposed by Petitioners constituted "telecommunications service." Order, at 6-8, *citing* ORS § 759.055(2)(g). The OPUC specifically rejected Petitioners' assertions that the dark fiber to be provided by the CLPUD to Petitioners, being *capable* of voice transmission, did not constitute a telecommunications service as defined in the statute. The OPUC similarly specifically rejected Petitioners' assertions that the services proposed were not "for hire" within the meaning of the statute. As such, Petitioners' applications proposed to offer the transport over the CLPUD's facilities both to end users and for resale, thereby requiring that certificates of authority pursuant to ORS § 759.020 be obtained. As noted by the OPUC, this finding was wholly consistent with its prior determinations with respect to the treatment of dark fiber as a telecommunications service. Order, at 8, *citing Application of Electric Lightwave*, Order No. 92-345.

In Order 97-373, the OPUC further found that as the provider of dark fiber to Petitioners for resale, the CLPUD also sought to provide a telecommunications service within the meaning of Oregon law, and therefore required a certificate of authority. Order, at 8. However, despite repeated invitations to submit an application, the CLPUD failed and refused to do so. Order, at 4.

II. THERE IS NO BASIS TO PREEMPT THE FINDINGS OF THE OPUC WITH RESPECT TO THE REQUISITES OF OREGON LAW.

A. The Burden of Proof and Production Rest With Petitioners.

Section 253(a) bars states and their political subdivisions from enforcing statutes, regulations and other legal requirements which prohibit, or have the effect of prohibiting, the ability of a putative carrier to provide any interstate or intrastate

telecommunications service. As Section 253 petitioners, the County and The Alliance bear both the burden of proof and the burden of production to establish that Section 253(a)'s test is met, and must present a fully developed factual record to the Commission.

With respect to a particular ordinance or other legal requirement, it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement ... must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c). We will exercise our authority only upon such fully developed factual records.

TCI CableVision of Oakland County, Inc., Docket No. CSR-4790, Memorandum Opinion and Order, FCC 97-331 (released September 19, 1997), at para. 101.

Petitioners have met neither of their burdens in the instant case. Petitioners' real request of the Commission is that it rewrite Oregon law and either determine that a certificate of authority is not needed to provide "dark fiber" or that the CLPUD may, despite contrary Oregon law, apply for a certificate from the OPUC. The Commission should decline such an invitation which is clearly contrary to Section 253.

B. There Is No Basis Under Section 253 For Disturbing the Finding of the OPUC that the Authorization for Petitioners' Proposed Services First Required the CLPUD to Obtain a Certificate of Authority.

As set forth in their applications, Petitioners sought authorization from the OPUC to be resellers of transport on the CLPUD's dark fiber facilities, nothing more. The OPUC specifically found that the CLPUD's provision of these facilities to Petitioners required the CLPUD to first obtain a certificate of authority. Order, at 8. However, despite the OPUC's repeated invitations to submit an application for a certificate of

authority, the CLPUD failed and refused to do so. Order, at 4. Plainly, Oregon's certification requirement is permitted under Section 253(b) as a competitively neutral means to protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. Thus, the fact that the OPUC denied Petitioners' applications because they proposed to resell services that would be unlawfully provided by the CLPUD without a certificate does not constitute grounds for preemption by the Commission under Section 253.

As Petitioners now admit, as a governmental entity created by statute, the CLPUD was not permitted by Oregon law to either seek or obtain a certificate of authority from the OPUC. Petition, at 3 ("The PUD, being a municipality of limited constitutional authority, does not have the power to apply for such a Certificate ...").³ With respect to Petitioners' preemption request, this admission simply ends the inquiry.

Section 253 does not grant the Commission the authority to require a state to permit its political subdivisions and governmental entities which are creatures of the state legislature to enter the telecommunications business. Nothing in the 1996 Act even remotely suggests that Section 253 may be utilized by subordinate state governmental entities to override the dictates of the state legislature. The State of Oregon clearly retains the right to determine for itself whether to enter the

³ In proceedings before the OPUC, GTE similarly argued that the County, being a political subdivision of the State of Oregon, lacked authority to seek and obtain a certificate of authority. Having found that the CLPUD was first required to obtain a certificate -- since the CLPUD's facilities provided the basis for Petitioners' applications -- but that the CLPUD failed to make such an application, the OPUC did not need to determine whether the County was independently authorized by the Oregon Legislature to itself seek and obtain a certificate of authority. Order, at 10.

telecommunications business, and it may authorize all, some or none of its subordinate governmental entities to do so. As the CLPUD certainly recognized by declining to submit an application, and as Petitioners now admit, Oregon law does not permit the CLPUD to be certificated as a telecommunications provider. Quite obviously, grave Constitutional concerns would be raised if a federal agency, acting under color of federal statute, sought to require a state to permit particular subordinate governmental entities to perform functions which the state chose not to authorize for those entities.

The fact that an entity -- whether governmental or corporate -- is limited with respect to the functions that it may perform or the businesses which it may conduct is hardly a surprising aspect of law. Virtually every state permits the creation of corporate entities for limited purposes, and such limitations are usually set forth in their articles of incorporation. Similarly, virtually every state permits the creation of private trusts for limited (most often, charitable) purposes, and the limitations are usually set forth in the trust documents. The logical implication of Petitioners' preemption claim is that the Commission, under the color of Section 253, could require states to allow all limited corporations and charitable trusts to engage in a business venture -- the provision of telecommunications services -- which is otherwise *ultra vires*. Nothing in the language or the legislative history of Section 253 supports such an absurd result. Simply stated, the fact that a state permits the creation of an entity -- governmental or corporate -- which is established for limited purposes, and such purposes do not include the provision of telecommunications services, patently does *not* mean that the state has erected an unlawful barrier to entry under Section 253.

B. There Is No Basis Under Section 253 For Disturbing the OPUC's Interpretation Under State Law as to the Provision of Which Intrastate Telecommunications Services Require a Provider to Obtain a Certificate of Authority.

While framing their arguments in the language of Section 253, what Petitioners' actually dispute is the OPUC's interpretation of Oregon law. Specifically, Petitioners simply take umbrage at the fact that the OPUC has determined dark fiber to be a "telecommunications service" within the meaning of the state statute. For this very reason, Petitioners have sought judicial review of this specific determination in the Oregon courts, as is permitted by Oregon law.⁴

As the Commission is well aware, states historically have established their own requirements for certifying telecommunications providers, and have defined in their laws or regulations which particular entities fit the classifications of providers requiring certification. The definitions of which entities must be certificated differ state-to-state, and always have. For example:

- Florida law variously defines "alternative local exchange telecommunications company", "basic local telecommunications service", "local exchange telecommunications company", "service", "telecommunications company", "telecommunications facility" and requires certification by the Florida Public Service Commission prior to the "operation of any telecommunications facility." Fla.Stat.Ann. §§ 364.02(1), (2), (6), (11), (12), (13) and 364.33 (West's Supp. 1998).

⁴ Two days after they filed the instant Petition, Petitioners appealed Order 97-373 to the Oregon Circuit Court, Marion County. *Lincoln County, et al. v. Oregon Public Utility Commission*, Case No. 97C-14075 (complaint filed November 19, 1997). Paragraph 8(1) of Petitioners' complaint specifically alleges that the OPUC's determination that dark fiber constitutes a "telecommunications service" as defined by ORS § 759.005(2)(g) is wrong. A true and correct copy of Petitioners' complaint is attached to this Opposition.

- Michigan law requires a telecommunications provider to obtain a "license" from the Michigan Public Service Commission prior to the "provision or resale of basic local exchange service." Mich.Stat.Ann. §§ 22.1469(301) (West's Supp. 1997)
- Texas law variously defines "public utility", "basic local telecommunications service", "dominant carrier", "incumbent local exchange company", "local exchange company", "local exchange telephone service", "public utility", "telecommunications provider" and requires that each "public utility" obtain a certificate of public convenience and necessity, a certificate of operating authority or a service provider certificate of operating authority before rendering service. Tex.Civ.Stat. Art. 1446c-0, §§ 3.002(1), (2), (3), (5), (6), (9), (11), 3.251, 3.2531, 3.2532 (Vernon's 1997).

The Commission certainly has no expertise to interpret Oregon law, nor should it be expected to do so. In contrast to the examples noted above, the Oregon statute, ORS § 759.005(2)(g), requires any entity seeking to provide "telecommunications service" to be certificated. See Order, at 5, *quoting* ORS § 759.005(2)(g) (defining "telecommunications service"). Whether the CLPUD's dark fiber qualifies under this definition is a matter for the OPUC and the Oregon courts, not this Commission.⁵ Petitioners should not attempt to place the Commission, under the guise of Section 253 preemption, in the position of second-guessing the competent Oregon authorities with respect to the requisites of their own law.

⁵ As the Commission has already recognized, the status of dark fiber is unsettled. For example, in the *Local Competition Order*, the Commission declined to determine whether dark fiber constitutes a network element under Section 251(c)(3). *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, at para. 450 (released August 8, 1996), *vacated in part on other grounds, Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). In Section 252 proceedings, some state commissions have said that dark fiber is a network element and some have said not.

III. CONCLUSION.

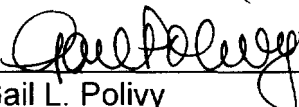
The Commission must decline Petitioner's invitation to dictate to the State of Oregon what state governmental agencies may offer telecommunications services, and to exempt such agencies of state legislative requirements to obtain certificates of operating authority from the Public Utility Commission of Oregon. Section 253 of the 1996 Act does not authorize such an exercise of preemptive authority, and assertion of any such authority would raise grave Constitutional concerns.

Respectfully submitted,

GTE Service Corporation, on behalf of its
affiliated domestic telephone operating,
wireless and video companies

John F. Raposa, HQE03J27
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(972) 718-6969

By



Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
(202) 463-5214

January 8, 1998

Its Attorneys

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THOMAS D. CLARK**

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

8 LINCOLN COUNTY, a political
9 subdivision of the State of Oregon, and
10 ECONOMIC DEVELOPMENT ALLIANCE
11 OF LINCOLN COUNTY, an Oregon
12 non-profit corporation.
13
14 Plaintiffs,
15
16 v.
17
18 OREGON PUBLIC UTILITY COMMISSION,
19 Roger Hamilton, Ron Eachus, and
20 Joan H. Smith, Commissioners,
21
22 Defendants.

Case # 97C-14075

COMPLAINT
(Appeal of PUC Order)

**CLAIM NOT SUBJECT TO
MANDATORY ARBITRATION**

The plaintiffs allege:

Plaintiff Lincoln County (hereinafter the "County") is a political subdivision of the State of Oregon.

Plaintiff Economic Development Alliance of Lincoln County (hereinafter the "Alliance") is an Oregon non-profit corporation.

Page 1 -- COMPLAINT (Appeal of PUC Order)

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2 The County and the Alliance propose to encourage economic development in Lincoln
3 County by way of providing a high-speed fiber optic data transmission system along the
4 central Oregon coast (hereinafter "CoastNet"). CoastNet would combine, ~~by~~ contract
5 between the County and the Alliance, an unswitched fiber optic cable system (hereinafter the
6 "Dark Fiber") owned by the Central Lincoln People's Utility District (hereinafter the "PUD")
7 and shared with the County through an ORS chapter 190 intergovernmental agreement, with
8 fiber optic data transmission switches owned by the Alliance. Under the CoastNet contract
9 between the County and the Alliance, the Alliance would then offer CoastNet services to
10 certain businesses and certain resellers of CoastNet services in an effort to encourage
11 economic development in Lincoln County.

4

12
13 The County and the Alliance were each an applicant for a ruling and order of the
14 defendant which either determined that the County and the Alliance were not required, prior
15 to offering CoastNet services, to obtain a Certificate of Authority to provide
16 telecommunications services in Oregon (hereinafter a "Certificate"), or a ruling and order of
17 the defendant granting a Certificate to the County and the Alliance.

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The applications of the Alliance and the County were filed on July 7, 1996, and September 3, 1996, respectively. US West Communications, Inc., filed protests to both applications, and GTE Northwest, Inc., filed a protest to the County's application. The County and the Alliance then filed application amendments, explanations, and briefs. The defendant's staff also filed comments.

6

On September 18, 1997, the defendant entered a final Order in its case numbers CP 120, CP 191, and CP 215 (hereinafter the "Order"). A true copy of that Order is attached to and made a part of this complaint as Exhibit "1."

7

The standard of review for the Order is whether there is clear and satisfactory evidence that the Order is unreasonable or unlawful in its findings of fact or conclusions of law.

ERROR OF LAW

8

The plaintiffs are aggrieved by the defendant's Order because the Order is unreasonable or unlawful in one or more of the following conclusions:

(1) That data transmission over a fiber optic network is "telecommunications service" as defined by ORS 759.005(2)(g), and is therefore subject to the Certificate requirement of ORS 759.020(1).

1 (2) That the County and the Alliance each need a Certificate prior to the provision of
2 CoastNet services, because those services will be "telecommunications service" within the
3 meaning of ORS 759.020(1) as defined by ORS 759.005(2)(g).

4 (3) That the PUD needs a Certificate prior to the provision of CoastNet services
5 because PUD's Dark Fiber will be a component of the CoastNet system, which involves the
6 provision of "telecommunications service" within the meaning of ORS 759.020(1) as defined
7 by ORS 759.005(2)(g)

8 (4) That the County and the Alliance each need a Certificate prior to the provision of
9 CoastNet services because those services will be telecommunications service on a "for hire"
10 basis within the meaning of ORS 759.020(1).

11 (5) That the PUD needs a Certificate prior to the provision of CoastNet services
12 because PUD's Dark Fiber will be a component of the CoastNet system, which involves the
13 provision of telecommunications service on a "for hire" basis within the meaning of ORS
14 759.020(1)

15 (6) That granting a Certificate to the County and the Alliance would not be in the
16 "public interest" within the meaning of ORS 759.020(4) because the PUD has not also
17 applied for a Certificate

18 (7) That Section 101(a) of the 1996 Telecommunications Act, codified as 47 USC §
19 253(a), does not preempt the defendant's power to apply the Certificate requirement of ORS
20 759.020(1) to the CoastNet participants

21 ///

UNLAWFUL DISCRIMINATION

7

Prior to issuing the Order, defendant previously granted a Certificate to another entity which proposed to utilize the PUD's Dark Fiber in the provision of telecommunications service. *In re Application of LandsEdge Communications, Inc.*, PUC docket No. CP 67, PUC Order No. 95-842 (August 10, 1995).

8

The plaintiffs are also aggrieved by the defendant's Order because the Order is unreasonable or unlawful because it unfairly discriminates against the plaintiffs in violation of one or more of the following:

(1) The privileges and immunities clause of Article I, Section 20, of the Constitution of the State of Oregon.

(2) The equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America.

(3) The privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States of America.

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1 WHEREFORE, in accordance with ORS 756.580 to 756.598, the plaintiffs pray for a
2 judgment of the court which:

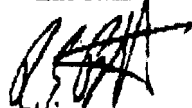
3 (1) Modifies, reverses, or remands the Order because the defendant has erred in one or
4 more of the particulars described in paragraph 6 of this complaint

5 (2) Modifies, reverses, or remands the Order because the defendant has unlawfully
6 discriminated against the plaintiffs as described in paragraph 6 of this complaint.

7 (3) Awards the plaintiff its costs and disbursements

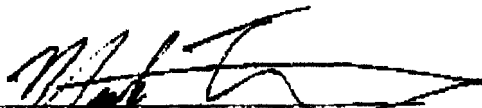
8 (4) Grants other relief that is just and equitable

DATED this 12th day of November, 1997.



Rob Bovett, OSB 91026
Assistant County Counsel
Attorney for Plaintiff Lincoln County
225 West Olive Street, Room 110
Newport, OR 97365
(541) 265-4108

DATED this 13th day of November, 1997.



Mark Trinchero, OSB 88322
Attorney at Law
Davis Wright Tremaine LLP
Attorney for Plaintiff Economic Development Alliance
1300 SW 5th Avenue, Suite 2300
Portland, OR 97201
(503) 778-5318

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply Comments of GTE" have been mailed by first class United States mail, postage prepaid, on January 8, 1998 to the following parties:

Janice M. Myles*
Federal Communications Commission
1919 M Street, NW, Room 544
Washington, DC 20554

Rob Bovett
Assistant County Counsel, Lincoln County
225 West Olive Street, Room 110
Newport, OR 97365

Mark Trinchero
Davis Wright Tremaine
1300 SW 5th Avenue, Suite 2300
Portland, OR 97201

Michael Weirich
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97310

Diane Davis
Public Utility Commission of Oregon
550 Capitol Street NE
Salem, OR 97310


Ann D. Berkowitz

*Hand Delivery